Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

SHAREFF RUDD,

Petitioner,

v.

JEFFREY BEARD, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WAS THE PETITIONER ENTITLED TO THE GRANT OF A CERTIFICATE OF APPEALABILITY WHERE HIS CONFESSION WAS OBAINED BY THE FUNCTIONAL EQUIVALENT OF AN INTERROGATION AS PER RHODE ISLAND v. Innis 446 U.S. 291 (1980).

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See attached exhibits from United States District Court for the Eastern District of Pennsylvania (5 a) the United States Court of Appeals for the Third Circuit (3a) and the United States Magistrate Judge (17a).

JURISDICTION

This Court has jurisdiction to entertain the Petitioner's claim that his right under the Fourteenth Amendment of the United States Constitution to due process of law and to counsel under the Fifth Amendment has not been honored in this case. A writ of certiorari is authorized sur 28 U.S. Code § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment protects the Petitioner's right to counsel and to due process of law and the Fourteenth Amendment makes that provision applicable to the states.

STATEMENT OF THE CASE

The Petitioner is Shareff Rudd, who was arrested on March 6, 2003 and charged with criminal homicide and related offenses. The case was tried before the Court of Common Pleas of Montgomery County, Pennsylvania, as per Criminal Division No. 2326-03. The Petitioner was convicted following a trial by jury of Murder of the First Degree and related offenses. The Petitioner appealed the conviction to the Superior Court of Pennsylvania (No. 0440 EDA 2004). By Memorandum Opinion filed November 23, 2004, the Superior Court affirmed the judgment of sentence. Commonwealth v. Rudd, 867 A. 2d 649 (Pa. Super. 2004). A Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania on April 11, 2005. Commonwealth v. Rudd, 872 A. 2d 173 (Pa. 2005).

On December 7, 2005, the Petitioner filed a timely Petition under the Pennsylvania Post Conviction Relief Act with the Court of Common Pleas of Montgomery County which was denied on February 6, 2007. The Superior Court of Pennsylvania affirmed that order on August 14, 2007 and the Supreme Court of Pennsylvania denied a Petition for Allowance of Appeal on March 11, 2008.

On April 29, 2008, the Petitioner filed a habeas corpus petition under 28 U.S. Code §2254 with the Clerk of the United States District Court for the Eastern District of Pennsylvania. That petition was

referred to the Honorable Timothy R. Rice, United States Magistrate Judge. On September 24, 2008, Judge Rice issued a Report and Recommendation recommending that the petition be denied as being without merit; however, Judge Rice recommended that there was probable cause to issue a Certificate of Appealability.

On August 24, 2009, the Honorable Cynthia M. Rufe, U.S. District Judge, ordered that the Report and Recommendation of Magistrate Judge Rice was approved and adopted, the Petitioner's objections to that Report and Recommendation were overruled, the Petitioner's habeas corpus petition was denied and a Certificate of Appealability would not issue. Rudd v. Beard, 2009 WL 2603158 (E.D.Pa. 8/24/09).

By Order dated February 17, 2010, a Panel of the United States Court of Appeals for the Third Circuit composed of Judges Fuentes, Jordan and Hardiman denied the Petitioner's Application for a Certificate of Appealability under 28 U.S. Code §2253. A true and correct copy of that Order is attached hereto (3a-4a).

Petitioner's application for reargument en banc was denied by order of the Court of Appeals dated March 16, 2010 (1a-2a).

STATEMENT OF REASONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THE PETITIONER SHOULD HAVE BEEN GRANTED A CERTIFICATE OF APPEALABILITY FOR REVIEW OF HIS CLAIM THAT HE WAS SUBJECT TO AN INTERROGATION UNDER RHODE ISLAND v. INNIS.

The Petitioner Shareff Rudd respectfully submits that this record will establish that the Pennsylvania authorities were engaged in a tactical plan designed to induce the Petitioner to incriminate himself by cunningly presenting to the Petitioner, along with his codefendant, police reports that contained the statements of the prosecution's key incriminating witnesses. At the suppression hearing before the state trial court, the prosecutor admitted that he and the police had devised this willful ploy for the purpose of eliciting a confession by creating circumstances, under police control, which they knew would compel the Petitioner to respond with incriminating information. At that hearing, the prosecutor testified that he was certain that once confronted with these charging documents in the presence of each other, the defendants would not be able to refrain from speaking: "The defendants are going to be under the immediate shock of having been arrested for

this crime, they will be reading our circumstantial layout of our case and I do not think that they will be able to help themselves from discussing it in each other's presence". [1]

The record shows that these defendants were being held in a locked interview room in a police station. They had already been questioned about the crimes for which they were in custody. The Petitioner was handcuffed to a chair, unable to get up and walk around, and was placed in a secure room with his codefendant for two hours. Thus it was clear that the police had a plan to induce an incriminating statement form the Petitioner. Clearly, these events constituted the "functional equivalent" of a custodial interrogation under this Court's decision in **Rhode Island v. Innis**, 446 U.S. 291 (1980).

As Justice Stevens stated in his dissenting Opinion in **Arizona v. Mauro**, 481U.S. 520 (1987), "It is undisputed that a police decision to place two suspects in the same room and then listen to or record their conversation may

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[1] This plan turned out just as devised. The wiretap transcript from the state court shows that the Petitioner's incrimmatory comments came as he was "reading" and "responding" to what was in the charging documents that were set before him and his codefendant.

constitute a form of interrogation even if no questions are asked by a police officer". Id at 535.

In that case, the defendant was taken into police custody after he freely admitted to killing his son. There, he indicated that he would not answer any questions without a lawyer. The police permitted the defendant's wife, who was also a suspect, to speak with her husband in the presence of a police officer. The defendant's resulting, incriminatory comments were permitted at trial. This Court affirmed because Mauro's confrontation with his wife in the presence of an officer was not the "kind of psychological ploy that properly could be treated as the functional equivalent of interrogation". Id. at 527.

As in **Mauro**, the crucial inquiry in this case is whether the confrontation occurred as intended by the police, and whether the authorities should have expected their ploy to work. If so, the Petitioner was indeed subjected to custodial interrogation "or its functional equivalent". Here, the psychological ploy designed by the prosecutor and the detectives resulted in the Petitioner offering incriminatory comments as he and his codefendant reviewed the police reports intentionally left in their presence. This ploy constituted a compulsion that established an interrogation under this Court's ruling in **Innis**. Certainly, the events that occurred here were above and beyond those events that are normally attendant to

routine police custody.[2] See **Innis**, supra at 301. The police cannot be permitted to avoid compliance with Miranda requirements under the guise of their departure from the interrogation room while leaving behind them the stimulus that they fully intend will yield incriminating responses.

In the decision of the Superior Court of Pennsylvania filed November 23, 2004, that Court, in its Memorandum Opinion, held that, "Simply leavings Bivings and Rudd in the holding room in the hope that they would speak to each other does not constitute the functional equivalent of questioning" because there was "no statement or action by the police that elicited a response from Rudd or Bivings". [3]

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[2]Pennsylvania Rules of Criminal Procedure provide that an arrestee may normally receive a copy of the Complaint (Rule 540(B)) but not the discovery (such as statements of witnesses) (Rule 573(B)).

[3] This conclusion is entitled to no deference because it represents the resolution of a mixed question of law and fact that is controlled by the decision of this Court in **Rhode Island v. Innis**, supra. **Thompson v. Keohane**, 516 U.S. 99, 110 (1995); **Miller v. Fenton**, 747 U.S. 104, 117 (1985).

The Petitioner contends that the police actions in this case cannot be fairly characterized as simply leaving the two codefendants in the holding room in the "hope" that they would speak to each other"; rather, the record clearly establishes that this situation resulted from an express design on the part of the authorities to place the defendants in a situation where they would be certain to make incriminatory statements. It is not fair to the defendants to say that these circumstances created a mere "hope that they would speak to each other"; instead, these admissions were the result of police actions that were planned to provoke, and did, incriminatory statements from the defendants.

The issue raised in this appeal was surely worthy of further review. In **United States v. Ortega Green**, 541 F. 3d 176 (3rd Cir. 2008), rehearing granted and Opinion vacated in 304 Fed.Appx. 981 (3rd Cir. 2003), and re-decided in 556 F. 3d 151 (3rd Cir. 2009), the Third Circuit was faced with the situation where a defendant was arrested and transported to DEA Offices where he was told that he had been indicted by a federal grand jury for distribution of narcotics. The defendant was then taken into an interrogation room where the agents showed him a video of a drug transaction in which the defendant appeared. Miranda Warnings were not administered to the defendant prior to showing the video, which was the result of a conscious decision on the part of the agents to defer Miranda Warnings until after the

defendant saw the video so as to gain his cooperation. At trial, the agent testified that upon showing the defendant the video, the defendant reacted in ways that clearly demonstrated an admission of guilt, such as lowering his head, taking a sigh and releasing a deep breath.

Judge Cowen, in his initial Opinion in **Green**, noted that under this Court's decision in **Rhode Island v. Innis**, supra, the court could "hardly imagine a more prototypical example of the functional equivalent of interrogation than when a suspect is shown a video in which he is depicted as engaging in a criminal act". In particular, the court noted that the agent had shown the defendant the video with the express design that the defendant would respond by incriminating himself and therefore the defendant's Miranda rights were implicated at the point that he was shown the video. Id. at 187.

As District Court Judge Rufe noted in her decision in this case, this ruling was vacated and replaced with a new decision: "The newly issued precedential Opinion of the Third Circuit regarding **Green** *leaves largely unaddressed* questions relating to the Fifth Amendment matters addressed in the first". In **United States v. Green**, 556 F 3d at 154, fn. 2, the Court of Appeals stated that, "Although the Government arguably violated Green's rights under the Fifth Amendment and the Miranda doctrine, the Court need not reach such constitutional issues at the present time".

Accordingly, the Petitioner respectfully submits that the law in this area under **Innis** is in fact evolving and unresolved.[4] Finally, in **Easley v. Frey**, 433 F. 3d

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[4] The Order of the Third Circuit denying a Certificate of Appealability cited three cases, but they are all distinguishable.

In **Illinois v. Perkins**, 496 U.S. 292, 297 (1990), an undercover Government agent was placed in the defendant's cell. The defendant was incarcerated on charges unrelated to the subject of the agent's investigation. The defendant made statements that implicated him in that crime. This Court held that conversations between suspects and undercover agents do not implicate the concerns underlying Miranda, which pertain to a police dominated atmosphere and compulsion. The instant case is not a case where the defendant freely conversed with someone who happened to be a Government agent.

In **United States v. Blake**, 571 F. 3d 331, 341 (4th Cir. 2009), the police provided the defendant with a copy of the statement of charges. This was deemed not to be an interrogation because no substantial information beyond routine procedural materials was presented to the defendant. As previously noted, the providing of statements of witnesses and police reports to a defendant immediately following his arrest is not a procedure in Pennsylvania that is normally attendant to arrest and cus-

969, 974 (7th Cir. 2006), an investigating officer was questioning an inmate about the killing of a prison warden. When the defendant initially refused to cooperate, the officer told the suspect that this offense was one for which, if convicted, he could be subject to the death penalty. As a result, the defendant gave an incriminating response. The Court held that the officer's statement about the death penalty cannot be fairly seen to have been likely to have elicited an incriminating response (unlike this case) and therefore did not rise to the level of interrogation under **Innis**, supra. The facts here present a situation where the police purposely designed an interrogation process to occur without any overt police questioning. Like the showing of an inculpatory video in **Green**, the submission of police reports containing eyewitness interviews was a willful ploy that was intended to compel the Petitioner to offer an incriminatory response.

Finally, the Petitioner notes that the United States Magistrate Judge had recommended that a Certificate of Appealability be issued because the Petitioner had raised "interesting factual and legal is

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tody, nor is it normal to provide a means whereby conversations regarding these reports are electronically monitored by the police.

sues and judicial application of Innis continues to evolve." The District Court disagreed, but these contrasting rulings show that jurists of reason do find these issues to be debatable. The test set forth in Innis is clearly in need of further development the lower courts. Therefore, the Petitioner Shareff Rudd respectfully submits that the claim presented in the instant federal habeas corpus litigation deserved encouragement for further review. Because the Petitioner's constitutional rights were abridged, federal habeas relief was warranted in this case.

CONCLUSION

For all the reasons expressed herein, the Petitioner, Shareff Rudd respectfully prays that this Honorable Court grant review of this important case to further clarify what was meant by the concept of the "equivalent" of interrogation, and notes that this Court has not issued an Innis ruling since the subject was discussed twenty years ago in Pennsylvania v. Muniz, 496 U.S. 582, 600 (1990).

Respectfully submitted,

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APPENDIX

APPENDIX A – SUR PETITION FOR REHEARING EN BANC, FILED MARCH 16, 2010

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

09-3743

SHAREEF RUDD,

Appellant

v.

JEFFREY BEARD, SECRETARY, ET AL;
THE DISTRICT ATTORNEY OF THE COUNTY
OF MONTGOMERY; THE ATTORNEY GENERAL
OF THIS STATE OF PENNSYLVANIA

SUR PETITION FOR REHEARING EN BANC

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN and GREENAWAY, Circuit Judges

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The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,

/s/ Julio M. Fuentes

Circuit Judge

DATED: March 16, 2010

PDB/cc: Burton A. Rose, Esq.
Robert M. Falin, Esq.

APPENDIX B – ORDER, DATED FEBRUARY 17, 2010

SHAREFF RUDD,

Appellant

vs.

JEFFREY BEARD, SECRETARY, ET AL;
THE DISTRICT ATTORNEY OF THE
COUNTY OF MONTGOMERY;
THE ATTORNEY GENERAL OF THE
STATE OF PENNSYLVANIA

C.A. NO. 09-3743

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ORDER

The foregoing application for a certificate of appealability is denied. Appellant has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. 2253(c)(2). Appellant has not demonstrated that jurists of reason could disagree with the District Court's holding that the state courts' resolution of his Fifth Amendment claim was neither contrary to nor an unreasonable application of clearly estab-

lished federal law. Miller-El v. Cockrell, 537 U.S .322, 327 (2003); see also Illinois v. Perkins, 496 U.S. 292, 297 (1990); United States v . Blake, 571 F.3d 331, 341 (4th Cir. 2009); Easley v. Frey, 433 F.3d 969, 974 (7th Cir. 2006).

By the Court,

/s/ Julio M. Fuentes

Circuit Judge

Dated: February 17, 2010
CLW/cc: Burton A. Rose, Esq.
Robert M. Falin, Esq.

APPENDIX C – ORDER, DATED AUGUST 24, 2009

IN THE UNTED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SHAREEF RUDD, Petitioner,	:	
	:	NO. 08-2021
v.	:	
JEFFREY BEARD, Respondent.	:	

ORDER

AND NOW, this 21st day of August 2009, upon consideration of Report and Recommendation [Doc. No. 15], the Objections filed in the above captioned

action pursuant to 28 U.S.C. § 2254 [Doc. No. 41], the Government's Response [Doc. No. 43], and a review of the record it is hereby **ORDERED** as follows:

1. The Clerk of Court is directed to remove this action from the suspense docket and return it to the active docket;

2. The Report and Recommendation of the United States Magistrate Judge Timothy R. Rice dated September 24, 2008 is **APPROVED AND ADOPTED.**

3. Petitioner's Objections to the Report and Recommendations are **OVERRULED;**

4. The Petition for Habeas Corpus Relief [Doc. No. 1] filed pursuant to 28 U.S.C. § 2254 is **DENIED;**

5. A certificate of appealability **SHALL NOT ISSUE.**

6. The clerk of Court shall **CLOSE THIS CASE.**

As a general matter, a district court may determine, in its discretion, the extent to which it will re

view the report and recommendation of a magistrate judge.[1] At a minimum, the court should be satisfied that there is no clear error on the face of the record,[2] and should "give some reasoned consideration to the magistrate's report before adopting it as the decision of the court."[3] This Court finds that Magistrate Judge Rice's Report and Recommendation is through and factually and procedurally correct, and that it should be adopted. However, a district court is required to review de novo those parts of a magistrate judge's report to which a litigant makes specific objection.[4]

A. First Objection: The Magistrate Judge applied an inappropriate level of deference to the state court's determination that no interrogation took place.

Petitioner contends that Magistrate Judge Rice applied inappropriate level of deference to the state

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[1] See Thomas v. Arn, 474 U.S. 140, 154 (1985); see also Goney v. Clark, 749 F.2d 5, 7 (3d Cir. 1984). (a district court may "accept, reject, in whole or in part, the magistrate's findings or recommendations."

[2] See Fed. R. Civ. P. 72(b) Advisory committee's note (p.63).

[3] Henderson v. Carlson, 812 F.2d 874, 878 (3d Cir. 1987)

[4] 28 U.S.C. § 636(b)(1)(C).

trial court's factual determination regarding whether Petitioner's statements were obtained in violation of his constitutional rights. Petitioner asserts that "no presumption of correctness should have been applied since the issue of custodial interrogation is a mixed question of fact and law under 2254 § (e)(1)."[5]

A federal court reviewing a § 2254 petition should presume that the state-court's fact findings are correct. However, a state-court determination that a suspect was not "in custody" when he confessed is not strictly a finding of fact warranting a presumption of correctness. The issue of whether a suspect is "in custody" presents a mixed question of law and fact qualifying for independent review in habeas corpus proceedings.[6]

In his Report and Recommendation ("R&R"), Magistrate Judge Rice amply acknowledged and correctly applied the standard requiring him to review the record as to both law and fact. The R&R contains a detailed analysis of the interplay between the two specific portions of § 2254 that he was obligated to consider. The Magistrate Judge acknowledged that under § 2254(e)(1) Petitioner would be permitted to rely upon evidence not presented to the state court

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[5] Objections at p. 3.

[6] See Thompson v. Keohane, 516 U.S. 99, 102 (1005)

in support of his habeas petition, which could result in a reassessment of the facts.[7]

However, he also noted that any new evidence allowed under § 2254(e)(1) must be considered in conjunction with the language of § 2254(d)(2), which states that habeas relief shall only be granted if rational jurist could not reach the same finding on the basis of the evidence in the record.[8] Moreover, Magistrate Judge Rice acknowledged that deference to a state court's factual findings is reserved for "basic, primary, or historical facts," resolution of which depends heavily on the trial court's "appraisal of witness credibility and demeanor."[9] He pointed out that "[s]uch inquiries allow a fact finder to assess 'what happened,' as opposed to making legal determinations, such as the voluntariness of a confession or the existence of a potential conflict of interest."[10]

Petitioner offered no additional evidence other than that which had been presented to the state court in support of his constitutional claims. Therefore, the Magistrate Judge was left to examine the

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[7] See R&R at p. 8.

[8] See Porter v. Horn, 276 F. Supp. 2d 278, 296 (E.D. Pa. 2003); R&R at p. 8.

[9] Keohane, 516 U.S. at 111.

[10] R&R at p. 8 (citing Keohane, 516 U.S. at 111).

state court record and determine whether, based on the evidence therein, a rational jurist could not reach the same conclusion as the state court. This Court finds no error in the standard of deference applied to the trial court's findings.

B. Second Objection: The Report and Recommendation misapplied the standard set forth in Rhode Island v. Innis

The Petitioner contends that the ruling of the Superior Court of Pennsylvania, in denying relief to this Petitioner on his claim that the Motion to Suppress his electronically recorded statements to the co-defendant, constituted an unreasonable application of the principles expressed in Rhode Island v. Innis, resulting in constitutional error.[11] In Innis, the United States Supreme Court considered under what circumstances a custodial investigation takes place. In that case, a murder suspect was arrested and read his Miranda rights for the first time, and then read those rights a second time when additional police arrived on the scene. The suspect advised the police that he understood his rights and wished to speak with an attorney. He was then placed in the back of a police car. As two policemen drove the car to their destination, they discussed their belief that the murder weapon had been discarded near a school

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[11] Objections at p. 2; see R.I. v. Innis, 446 U.S. 291 (1980).

for disabled children and spoke of the possibility that a student at the school could find that weapon. Although the policemen's conversation did not include defendant, and neither officer directed any comments or questions to the suspect, he overheard the conversation and asked the policemen to turn the car around so that he could show them where the murder weapon was hidden. He thereafter sought to suppress his incriminating statements as given in the context of a "custodial interrogation" in violation of his Fifth Amendment rights.

The Supreme Court found that the suspect's Fifth Amendment rights under Miranda had not been violated because, although he was in custody, "the special procedural safeguards outlined in Miranda are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. 'Interrogation,' as conceptualized in the Miranda opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself."[12] However, the Supreme Court also held that "interrogation" does not only refer to the explicit words or questions of police officers, but also their actions.[13]

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[12] Innis, 446 U.S. at 300.

[13] Id. at 300-301.

> [T]he Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term, 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police."[14]

Since Innis, the Supreme Court has addressed a number of situations in which they determined whether a defendant offered an incriminating statement in the context of a custodial interrogation. The Supreme Court has consistently held that "[c]onfessions remain a proper element in law enforcement. Any Statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings of counsel, but whether he can be interrogated...volunteered state

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[14] Id.

ments of any kind are not barred by the Fifth Amendment."[15] Moreover, the Supreme Court has stated that "Officers do not interrogate a suspect simply by hoping that he will incriminate herself."[16]

There is no question that Petitioner was in custody of police when he offered an incriminating statement. The constitutional question, however, pivots on the determination of whether he was being "interrogated" by police. Magistrate Judge Rice concluded, and this Court agrees, that the facts support a finding that Petitioner was not being interrogated. There were no police in room for the entire period that Petitioner and the co-defendant were being recorded. Therefore, Petitioner cannot claim that any officer's words or actions intimidated him into offering a confession. Moreover, Petitioner and the co-defendant had been read their Miranda rights and specifically advised that anything they said to each other could be used against them. Additionally, the fact that Petitioner and co-defendant spoke of the possibility that they were being recorded and still chose to speak with each other about the possible charges against them shows that Petitioner was aware of the consequences of the conversation and independently chose to engage in it regardless. Such

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[15] Ariz. v. Mauro, 481 U.S. 520, 529 (1987) (citing Miranda, 384 U.S., at 478).

[16] Mauro, 481 U.S. at 529

actions also establish that Petitioner did not "perceive" that he was being interrogated and that the statement was offered voluntarily.

Yet, the weight of Petitioner's argument lies in his contention that the presence of an affidavit outlining the potential charges against him and the co-defendant is the factor that distinguishes this situation as a "custodial interrogation." Yet, Petitioner can point to no controlling federal law that would direct the Court to consider the presence of an affidavit and paperwork containing information about potential charges against him as evidence of an interrogation. Instead, Petitioner relies on the Third Circuit ruling in United States v. Green,[17] which, since the R&R was submitted, has been vacated and replaced with a subsequent ruling by the Third Circuit following a rehearing. The newly issued precedential opinion of the Third Circuit regarding Green leaves largely unaddressed questions related to the Fifth Amendment matters addressed in the first.[18]

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[17] 541 F.3d 176, 184 (3d Cir. 2008) (vacated by 304 Fed. Appx. 981; 2008 U.S. App. LEXIS 26953) (substituted opinion at 556 F.3d 151, 153 (3d Cir. 2009).

[18] U.S. v. Green 556 F.3d 151, 154 n.2 (3d Cir. 2009)("Although the Government arguably violated Green's rights under the Fifth Amendment and the Miranda doctrine, the Court need not reach such constitutional issues at the present time.")

The crucial factor in the present case is that police officers were not present in the room with Petitioner at the time he reviewed any of the documents in question, or spoke with the co-defendant. "The essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone that he believes to be a fellow inmate. Coercion is determined from the perspective of the suspect. When a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking."[19] Petitioner was in custody, but the elements that the Supreme Court has consistently held create an atmosphere of interrogation were not in place at the time Petitioner offered incriminating statements. He was in a room, twice Mirandized, alone with the co-defendant, without interruptions from or the presence of police. The Court finds no Fifth Amendment violation and concludes that each of Petitioner's objections are without merit and will be overruled.

Conclusion

The R&R is adopted in full, except for Magistrate Judge Rice's recommendation that this Court recommend the issuance of a certificate of appealability. A court should issue a certificate of appealability where a petitioner makes a 'substantial showing of

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[19] Illinois v. Perkins, 496 U.S. 292, 296 (1990).

the denial of a constitutional right."[20] A petitioner meets this burden by showing that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."[21] Particularly in light of Petitioner's heavy reliance on the Third Circuit's original opinion in U.S. v. Green, which has since been vacated, the Court finds that Petitioner has not met his burden here. Thus, a certificate of appealability will not issue.

It is so **ORDERED.**

BY THE COURT:

S/Cynthia M. Rufe

CYNTHIS M. RUFE, J.

[20] 28 U.S.C. § 2253(c)(2).

[21] Slack v. McDaniel, 529 U.S. 473, 484 (2000).

APPENDIX D – REPORT AND RECOMMENDATION OF JUDGE RICE FILED SEPTEMBER 24, 2008

SHAREFF RUDD — CIVIL ACTION

Petitioner — No. 08-2021

v.

JEFFREY BEARD, et al

Respondents

REPORT AND RECOMMENDATION

TIMOTHY R. RICE — September , 2008
U.S. MAGISTRATE JUDGE

Resolution of this case depends on whether the state court unreasonably applied clearly established Supreme Court law in concluding the police did not conduct the functional equivalent of a custodial interrogation. Petitioner Shareef Rudd[22] claims police

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[22] Rudd filed this counseled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He is incarcerated at the State Correctional Institutional at Mahanoy for first-degree murder, conspiracy, aggravated assault, and carrying a firearm without a license. See Criminal Docket at 4-5, Commonwealth v. Rudd, No. CP-46-CR-0002326-2003 (Ct. Com. Pl. Mont.) [hereinafter Criminal Docket].

willfully crafted a ploy to deprive him of his right to be free from self-incrimination by placing him and his co-defendant in a holding room and leaving the charging documents with hope the tactic would elicit incriminating statements. See Miranda v. Arizona, 384 U.S. 436 (1966). The nuances of this fact-intensive inquiry were presaged in United States v. Innis, 446 U.S. 291, 299 (1980), where the Court found police practices short of direct questioning may implicate the Fifth Amendment safeguards outlined in Miranda.

For the following reasons, and after oral argument on September 12, 2008, I respectfully recommend Rudd's claim be denied as meritless. Although I firmly believe Rudd's claim will fail, jurists of reason may debate my recommended disposition. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). As evidenced herein, Rudd raises interesting factual and legal issues, and judicial application of Innis continues to evolve. Therefore, a certificate of appealability should be granted. See id.; generally Lewis v. Florida, 486 U.S. 1036 (1988)(White, J., dissenting from denial of petition for writ of certiorari)(state and federal courts disagree on the substantial question whether confronting a suspect with evidence against him is the "functional equivalent" of interrogation under Innis).

FACTUAL AND PROCEDURAL HISTORY

On March 6, 2003, Rudd was arrested and brought to Lower Merion Montgomery County Police Department with his co-defendant Terrance Bivings. See Transcript of Suppression Hearing at 111, Commonwealth v. Rudd, 2326-03 (Ct. Com. Pl. Mont. Oct. 14, 2003) [hereinafter Suppression Hearing]. The police arrested Rudd for a December 24, 2002 shooting arising from a drug-dealing turf war. Rudd and Biving were initially placed in separate rooms. Id. at 112. After asking about the charges, Rudd was read in Miranda rights, said he understood those rights and did not want a lawyer, and voluntarily gave a statement. Id. at 111-14. Rudd's statement apparently was not incriminating, and police embarked on another, pre-arranged, investigative path. Id. at 115. After Rudd initially spoke to police, a detective testified, "we then removed Rudd, put him in an interview room with Bivings," collected their personal effects and handcuffed each of them to a chair. Id.

Armed with an order from a Pennsylvania Superior Court judge, police secretly tape recorded a conversation between Rudd and Bivings, who were handcuffed to separate chair in a police holding room. Id. at 108. As required by the court order, po-

lice first read Rudd and Bivings their Miranda rights.[23] Id. at 115. The warning included a statement that anything Rudd and Bivings said to each other could be used against them. Neither defendant invoked his rights and neither defendant waived his rights.[24] After police placed affidavits of probable cause and other charging documents in front of Rudd and Bivings, they left them alone in the room and activated a concealed tape recorder. Id. at 123; Transcript of Continued Hearing on Pretrial Motions at 207-08, Commonwealth v. Rudd, 2326-03 (Ct. Com. Pl. Mont. Oct. 15, 2003). Police recorded two hours of conversation between Rudd and Bivings, including incriminating statements of possible alibis and statements discussing the possibility police were monitoring their conversation. At trial, the

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[23] The record is silent on the exact passage of time between the first and second Miranda warnings, and the state court did not addressed the issue. I have not considered supplemental evidence submitted by the Commonwealth after oral argument, in which it claims a police report shows forty-five minutes elapsed between the two Miranda warnings. The state courts did not possess such evidence and it cannot support the state courts' application of federal law.

[24] As the state court noted, the Superior Court did not require police to obtain a waiver before secretly recording the conversation. Rather, the order required only that police advise Rudd and his co-defendant of their Miranda rights. See Commonwealth v. Rudd, No. 2326-03, slip op. at 15 (Ct. Com. Pl. Mont. Apr. 2, 2004).

court denied Rudd's attempt to suppress the statements.

On October 23, 2003, a jury found Rudd guilty of first-degree murder, conspiracy to commit murder, aggravated assault, and carrying a firearm without a license. See Criminal Docket at 4-5, 14. On January 15, 2004, the court sentenced Rudd to life imprisonment for first degree murder. Id. at 4. Rudd was also sentenced concurrently to twenty-to-forty years imprisonment for conspiracy to commit murder and one-to-seven years imprisonment for the firearms violation, and sentenced consecutively to four and one-half-to-fifteen years imprisonment for aggravated assault. Id. at 4-5.

Rudd filed a timely appeal to the Superior Court. The trial court filed an opinion to support affirmation of the judgment of sentence on appeal. Commonwealth v. Rudd, No. 2326-03 (Ct. Com. Pl. Mont. Apr. 2, 2004) [hereinafter Trial Court Opinion]. In addressing the recorded conversation, the court found the police followed procedures required by court order by reading Rudd and Bivings their Miranda warnings, including the language informing them that anything they said to each other could be used against them. Id. at 13-15. The court concluded police were not required to obtain an explicit statement Rudd and Bivings understood their rights, or an explicit waiver of those rights, before proceeding with the interception. Id. at 15. Crediting a detec

tive's testimony, the court found Rudd and Bivings appeared to be paying attention and to understand what was said when police read them their rights. Id. It further found Rudd and Bivings were not asked to acknowledge their understanding of the Miranda rights in writing because the police did not intend to question them. Id. at 15 n.7. The court held simply leaving Rudd and Bivings in a room together with their criminal complaints, with the hope they would speak to each other, was not the functional equivalent of interrogation, and the intercepted statements were not elicited by the detectives. Id. at 16.

The Superior Court affirmed on November 23, 2004. Commonwealth v. Rudd, 867 A.2d 649 (Pa. super. Ct. 2004) (table); Commonwealth v. Rudd, 440 EDA 2004 (Pa. Super. Ct. 2004) (unpublished opinion) [hereinafter Superior Court Opinion]. The Superior Court agreed that simply leaving Rudd and Bivings in the holding room with the hope they would speak to each other did not constitute the functional equivalent of questioning. See id. at 15. The court found no statement or action by the police elicited a response, and therefore, no interrogation occurred. Id. The court found it highly probative that Rudd chose to speak freely after being informed of his rights. Id. at 14-15 (citing Commonwealth v. DeJesus, 787 A.2d 394, 406 (Pa. 2001)). Rudd requested leave to file a petition for allowance of appeal, which the Supreme court of Pennsylvania denied on April

11, 2005. Commonwealth v. Rudd, 872 A.2d 173 (Pa. 2005) (table).

On December 7, 2005, Rudd filed a petition pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541 et seq., which was denied on February 6, 2007. See Criminal Docket at 25-32. Rudd appealed, and the Superior Court affirmed on August 14, 2007. Id. On March 11, 2008, the Supreme Court of Pennsylvania denied Rudd's petition for allowance of appeal. Id.

On April 29, 2008, Rudd filed a timely habeas petition alleging his federal constitutional right to be free from self-incrimination under Miranda was violated when the court permitted the prosecution to admit evidence of incriminatory statements Rudd made while in police custody. See Petition at 9, 13-25, Rudd v. Beard, No. 08-2021 (E.D. Pa. filed Apr. 29, 2008) [hereinafter Petition]. Rudd alleges the state court unreasonably determined the facts by allowing a "surreptitiously recorded conversation between [Rudd and Bivings] to be admitted into evidence" when Rudd was subject to the functional equivalent of custodial interrogation during its recording, and unreasonsably applied the principles set forth in Innis. See Petitioner's Memorandum of Law in Support of Reply to Respondent's Answer to Petition for Writ of Habeas Corpus at 2, Rudd v. Beard, No. 08-2021 (E.D. Pa. filed July 18, 2008) [hereinafter Petitioner's Memorandum].

DISCUSSION

A. Collateral Review of State Court Decisions

State court decisions merit substantial deference. See 28 U.S.C. § 2254(d)(1). A writ of habeas corpus cannot be granted unless I find the state court's adjudication of Rudd's claim (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d). I must presume the state court's finding of fact are correct and Rudd must rebut that presumption of correctness by clear and convincing evidence. § 2254(e)(1); Miller-El v. Cockrell, 537 U.S. 322, 340-41 (2003).

A state court ruling is "contrary to" clearly established Supreme Court precedent for the purposes of § 2254(d)(1) "if the state court applies a rule that contradicts the governing law" set forth in Supreme Court cases, or "if the state court confronts a set of facts that are materially indistinguishable from" a Supreme Court decision and nevertheless arrives at a result different from its precedent. Williams v. Taylor, 529 U.S. 362, 405-06 (2000). The state court judgment must contradict clearly established deci

sions of the Supreme Court, not merely law articulated by any federal court, id. at 405, although district and appellate federal court decisions evaluating Supreme Court precedent may amplify such precedent, Hardcastle v. Horn, 368 F.3d 246, 256 n. 3 (3d Cir. 2004) (citing Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 890 (3d cir. 1999)). The state court is not required to cite or even have an awareness of governing Supreme Court precedent "so ling as neither the reasoning nor the result of [its] decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002).

A state court decision constitutes an "unreasonable application" of Supreme Court precedent if it identifies the correct governing legal rule from Supreme Court cases, but "unreasonably applies it to the facts of the particular state prisoner's case." Williams, 529 U.S. at 407. When making the "unreasonable application" inquiry, I must determine "whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 409; see also Matteo, 171 F.3d at 891 (whether the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under Supreme Court precedent). A 'court that unreasonably extends an established rule to a new context where it should not apply, or unreasonably fails to extend such a rule to a new context where it should apply, may be deemed to have un

reasonably applied the correct rule. Williams, 529 U.S. at 407. A showing of clear error is not sufficient. Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003); see also Douglas v. Cathal, 456 F.3d 403, 417 (3d cir. 2006)(grant of writ inappropriate where state determination was not objectively unreasonable, even where reasonable jurist may disagree about the correct disposition of the underlying claim). I may also not grant habeas relief merely because the state court applied federal law erroneously or incorrectly. Thomas v. Varner, 428 F.3d 491, 497 (3d Cir. 2005); Jacobs v. Horn, 395 F.3d 92, 100 (3d Cir. 2005).

Inquiry into state court factual determinations involves the interplay of two separate provisions of § 2254. Relief may be granted on a habeas claim involving state court factual findings only if such findings were based on an "unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceedings." §2254(d)(2); Porter v. Horn, 276 F.Supp.2d 278, 296 (E.D.Pa. 2003)(Kelly, J.); Attica v. Frank, 2001 WL 827455, at *3 (E.D. Pa. July 11, 2001) (Padova, J.). In evaluating a challenge to the state court's factual findings under § 2254(d)(2), a federal habeas court must consider the provision's relationship with § 2254(e)(1), which requires that a state court's determination of a factual issue be presumed correct. Both provisions "express the same fundamental principle of deference to state court [factual] findings." Sterling v. Tennis, 2006 WL

1409719, at *4 (E.D. Pa. May 18, 2006) (Strawbridge, J.) (quoting Lambert v. Blackwell, 387 F.3d 210, 235 (3d Cir. 2004)).

The provisions create a two-step process for factual review under § 2254. First, although Rudd may rely upon evidence not presented to the state court to rebut the presumption of correctness of specific factual determinations under § 2254(e)(1), Sterling, 2006 WL 1409719, at *4 (citing Lambert, 387 F.3d at 235), he must show evidence so "clear, direct, weighty and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue" to satisfy the clear and convincing standard, Porter v. Horn, 276 F.Supp.2d 278, 296 n.10 (E.D. Pa. 2003) (Kelly J.) (quoting Attica, 2001 WL 827455, at *3). Second, as Judge Strawbridge noted, even if Rudd can prevail under § 2254(e)(1), § 2254(d)(2) permits relief only if in light of the state court's unrebutted factual determinations, its adjudication of the claim was unreasonable. Sterling, 2006 WL 1409719, at * 4 (citing Lambert, 387 F.3d at 235, 236 n.19). Under § 2254(d)(2), I am restricted to review "the state court's factual detemination to the evidence ...presented to the state court." Sterling, 2006 WL 1409719, at *4 (citing Lambert, 387 F.3d at 235). A factual determination should be adjudged "unreasonable under 2254(d)(2) only if [I find] a rational jurist could not reach the same finding on the basis of the evidence in the re-

cord." § 2254(d)(2); see Porter, 276 F.Supp.2d at 296 (§ 2254(d)(2) requires federal habeas courts to objectively examine state court decisions for their reasonableness similar to the unreasonable application of law clause in § 2254(d)(1)).

Deference to a state court's factual findings is reserved for "basic, primary, or historical facts," resolution of which depends heavily on the trial court's "appraisal of witness credibility and demeanor." Thompson v. Keohane, 516 U.S. 99, 111 (1995). Such inquiries allow a fact finder to assess "what happened," id., as opposed to making legal determinations, such as the voluntariness of a confession or the existence of a potential conflict of interest. Id. at 111-12 (whether suspect is "in custody" under Miranda is a mixed question of fact and law).

B. Fifth Amendment Principles

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V. This provision precludes the prosecution from using "statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda, 384 U.S. at 444. The procedural safeguards, which have become familiarly recognized as Miranda warn

ings, counteract the inherent coercive effect of a custodial interrogation and the reality that a suspect speaking with those he knows to be law enforcement officers "will feel compelled to speak by the fear of reprisal for remaining silent or in the hope of more lenient treatment should he confess." Illinois v. Perkins, 496 U.S. 292, 296-97 (1990).

Custodial interrogation includes express questioning or its functional equivalent. Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). The functional equivalent of express questioning is "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Id. at 301. The inquiry focuses primarily on the perceptions of the suspect, rather than the intent of the police. Id. at 301. However, police intent is relevant if it bears "on whether the police should have known their words or actions were reasonably likely to evoke an incriminating response." Id. at 302 n. 7.

The pivotal question, however, is the presence of police "coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust . . . " See Perkins, 496 U.S. at 297 (no custodial interrogation when suspect speaks with undercover police officer posing as a fellow prisoner). Thus, police intent must be examined in the context of whether the police conduct created an element of coercion or com-

pulsion, as envisioned by Miranda. See Innis, 446 U.S. at 300, 303 n.10 (police conduct must rise to level of "subtle compulsion"); Perkins, 496 U.S. at 296 (police tactic did not implicate concerns of compulsion upon which Miranda was based). This inquiry, however, is inherently complex and uncertain-for both courts and the police. See, e.g. Innis, 446 U.S. at 304-05 (Burger, C.J., concurring); id. at 313 n. 13 (Stevens, J. dissenting); accord Lewis, 486 U.S. at 1036 (White, Jr., dissenting) (noting "significant" judicial disagreement in application of Innis).

To constitute an interrogation, police conduct "must reflect a measure of compulsion above and beyond that inherent in custody itself." Innis, 446 U.S. at 300. "Miranda warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement," Perkins, 496 U.S. at 294, because coercion is determined from the suspect's perspective and the situation does not implicate the concerns underlying Miranda. See id. at 296. Similarly, police "[p]loys to mislead a suspect or lull him into a false sense of security" not rising to the "level of compulsion or coercion to speak" do not implicate Miranda's concerns. Id. at 297. Therefore, a suspect is not interrogated when he voluntarily speaks in the absence of compulsion, psychological ploys, or direct police questioning. See Arizona v. Mauro, 481 U.S. 520, 529 (1987).

For example, in Innis, a murder suspect invoked his rights under Miranda, after which two police officers discussed in the suspect's presence their concerns that handicapped school children might find the missing murder weapon and hurt themselves. Innis, 446 U.S. at 294-95. The suspect interrupted the officers and advised them he would inform them of the weapon's location. Id. at 295. The Court held the suspect "was not subjected by police to words or actions that the police should have know were reasonably likely to elicit an incriminating response from him." Id. at 303. The Court noted there was n evidence police knew the suspect was "peculiarly susceptible" to appeals to his conscience or that he was unusually disoriented or upset at the time policed engaged in the contested conduct. Id. at 302-03. To illustrate the level of police "subtle compulsion" that falls short of "interrogation" under Miranda, the Court observed that police lawfully could drive past the site of a concealed weapon on a direct route to the police station, which could prompt the suspect to notice the proximity of the weapon on a direct route to the police station, which could prompt the suspect to notice the proximity of the weapon to the school, and create a possibility the suspect could blurt out and incriminating statement. Id.. at 303 n.10.

In Mauro, a suspect invoked his rights under Miranda, but was then permitted to speak with his wife after being informed it would occur only in police presence with a tape recorder. Mauro, 481 U.S.

at 522. The Court held the suspect was not interrogated in violation of the Fifth Amendment because the police asked the suspect no questions and did not engage in any psychological ploy that would constitute the functional equivalent of interrogation. Id. at 527. Moreover, the Court rejected the suspect's claim that police violated his rights by failing to warn him of their intent to eavesdrop on this conversation. Relying on the trial court's factual findings, the Court noted police explained to the suspect he could speak with his wife only if police were present "to observe and hear what was going on," and police then placed a recording device in plain view. Id. at 527 n.5 .This warning placed the suspect on notice of the police motives and eliminated any suggestion that police created an "atmosphere of oppressive police conduct" through a "powerful psychological ploy." See id.

Similarly, in Perkins, police crafted a plan to elicit incriminating statements about an unsolved murder from a prisoner serving an unrelated burglary sentence. See Perkins, 496 U.S. at 294. Fearing an eavesdropping device would be "impracticable and unsafe," police crafted a ploy to place an undercover agent in the cellblock with murder suspect. No Miranda warnings were given. As police hoped, the murder suspect made incriminating statements, which formed the basis of his murder conviction. Id. at 295. The Court found police had not conducted a custodial interrogation or its equivalent and therefore held no Miranda warnings are designed to ad-

dress a "police-domination atmosphere and compulsion," neither of which is present when a suspect considers himself in the company of a cellmate. Id. at 296-97. Police may lawfully take advantage of a suspect's misplaced trust through strategic deception. Id. at 297.

Recently, the United States Court of Appeals for the Third Circuit applied Innis and held it was plain error to introduce incriminating statements made by a defendant in police custody after police showed him videotaped evidence of his drug dealing, but before police read him Miranda warnings. United States v. Green, 2008 WL 4014129, at *8(3d cir. Sept. 2, 2008). As the court noted, "we can hardly imagine a more prototypical example of the 'functional equivalent' of interrogation than when a suspect is shown a video in which he is depicted as engaging in a criminal act." Id. Essential to the court's holding, however, was an admission by the Drug Enforcement Administration agent that he had intentionally withheld Miranda warnings before showing the video because he feared the defendant would refuse to speak if advised of his Fifth Amendment rights. Id. at *6, *8. In addition, the court noted, the incriminating video was shown to the defendant while police were present in the room observing his reactions. Id.

Absent such express police intent to subvert the constitutional principles safeguarded by Miranda warnings, other appellate courts have held confront-

ing suspects with incriminating evidence is not the functional equivalent of interrogation under Innis. For example, in Caputo v. Nelson, 455 F.3d 45, 50-51 (1st Cir. 2006), the court held the state court had not unreasonably applied Innis and Miranda in determining that confronting a suspect with evidence against him did not rise to the functional equivalent of interrogation. Similarly, in United States v. Payne, 954 F.2d 199, 203 (4th Cir. 1992), the court observed that whether police descriptions of incriminating evidence constitute the functional equivalent or interrogation "will depend on circumstances that are too numerous to catalogue." After acknowledging the deference due to the trial court on such matters, the court held a police discussion with the suspect about incriminating evidence did not constitute interrogation because it was not reasonably likely to elicit an incriminating response and the suspect was not subjected to "compelling influences, psychological ploys, or direct questioning." Id. (quoting Mauro, 481 US at 520); accord Enoch v. Gramely, 70 F.3d 1490, 1500 (7th cir. 1995) (identifying the victim and briefly stating the evidence is not the functional equivalent of interrogation).

C. Rudd's Challenges

Rudd alleges the state court unreasonably determined the facts and unreasonably applied Innis by admitting the record conversation into evidence. See Petitioner's Reply at 1.

First, Rudd challenges the state court's factual determination. He claims the court's factual findings were unreasonable because the court relied on the detectives' testimony that they left Rudd and his co-defendant in the holding room "in the hope that they would speak to each other," but ignored testimony from the county's chief prosecutor at a suppression hearing. The prosecutor had opined he did not "think [Rudd and his co-defendant] would be able to help themselves from discussing [the murder] in each other's presence." See Petitioner's Reply at 3 (citing Suppression hearing at 114; accord id. at 113). The statement, Rudd argues, establishes the state court erred by failing to find police crafted a "willful ploy designed to elicit an incriminating response" by placing charging documents in Rudd's presence and then eavesdropping on Rudd's conversation. His claim fails.

The state court heard the testimony and fully considered all the evidence, including the passages cited by Rudd in his September 17, 2008 supplemental memorandum. See Suppression Hearing at 113-114; Trial Court Opinion at 13-16. Moreover, the distinction Rudd draws is immaterial and did not impact the state court's finding that the police conduct was not designed to elicit an incriminating response from Rudd. The prosecutor's suppression hearing testimony supports the state court's finding of fact because even if the police "believed" Rudd would not be able to resist discussing the murder with his co

defendant, such a belief is indistinguishable from a police "hope" that their tactic would elicit an incriminating statement. See Mauro, 481 U.S. at 527 n.5, 528; accord Perkins, 496 U.S. at 296-98. Rudd has failed to offer new evidence to rebut the presumption of correctness under § 2254(e)(1), and has failed to establish a rational jurist could not reach the same finding as the state court under § 2254(d)(2). For example, he has failed to produced evidence, as in Green, 2008 WL 4014129, at *8, that police crafted a ploy to preclude Rudd from understanding or asserting his Fifth Amendment rights. To the contrary, police twice advised Rudd of his rights and he never invoked his right to counsel or to remain silent. Under either § 2254's deferential standard or a de novo standard, the state court did not make an unreasonable determination of the facts. Therefore, such evidence fails to render the state courts' factual findings "objectively wrong."[25] See Petitioner's Memorandum at 6-7.

Second, Rudd alleges that state court unreasonably applied Innis by finding no interrogation occurred when Rudd's conversation with his co-

[25] Although a fact finder writing on a clean slate could have construed the evidence as Rudd suggests, I cannot conclude under § 2254(d)(2)'s deferential standard that a rational jurist could not reach the same finding as the state courts even considering the prosecutor's testimony.

defendant was recorded. See Petitioner's Reply at 4. Rudd alleges the functional equivalent of interrogation occurred because police questioned him about the crime for which he was in custody, and then locked him in an interview room with is co-defendant for two hours, handcuffed him to a chair and baited him to discuss incriminating charging documents strategically placed in his presence to elicit an incriminating response. Id. at 7. The Superior Court found simply leaving Rudd and his co-defendant in the holding room in the hope they would speak to each other did not constitute the functional equivalent of questioning because no statement or action by the police elicited a response. See Superior Court Opinion at 15.

The admission of Rudd's statements to his co-defendant was neither contrary to nor an unreasonable application of Innis. In finding no interrogation occurred, the state court reasonably applied Innis because the statements were not made in response to express questioning by any law enforcement officer, nor were the statements elicited in response to words or action on the part of the officers that they "should have know were reasonably likely to elicit an incriminating response." See Innis, 446 U.S. at 292. It was not unreasonable for the state court to find no interrogation occurred because the concerns of Miranda are not implicated when a suspect is not talking to a law enforcement officer. See Perkins,

496 U.S. at 294-96. As in Perkins, no compulsion existed when Rudd made his incriminating statements to his co-defendant, an individual he knew was not an agent of law enforcement. 496 U.S. at 296-97. Even if the officers placed the charging documents in the room the Rudd as ploy to get Rudd to speak, it did not rise to the level of compulsion needed to constitute the functional equivalent of an interrogation to implicate Miranda's concerns. See id. at 297; see also United States v. Oppong, 165 Fed. Appx. 155, 160 (3d Cir. 2006) (police advising defendant of the charges against him, the evidence implicating him, and of potential penalties before reading him his Miranda rights did not constitute the functional equivalent of an interrogation). Rudd's emphasis on the fact he was handcuffed and confined to a holding cell is relevant to the uncontested issue of his custodial status, as well as to the level of police coercion. Standing alone, however, the nature of his confinement does not transform a permissible investigative ploy into an unconstitutional interrogation. Rudd was not, for example, subject to inherently coercive tactics created by a fear of police reprisal for remaingin silent or by a hope for leniency if he confessed. See Perkins, 496 U.S. at 246-47.

Rudd was motivated to speak by his desire to craft an alibi with his co-defendant, see Trial Court Opinion at 13, and not by any police compulsion or coercion. He was placed in a situation similar to the

suspect in Perkins, who spoke to the undercover officer posing as a cellmate with the hope of hatching an escape plan and impressing his fellow inmate with his past misdeeds. See Perkins, 496 U.S. at 295, 298. Contrary to Rudd's claim, see Reply Memorandum at 5, placing charging documents in Rudd's presence was not a psychological ploy that posited Rudd's guilt, see Easly v. Frey, 433 F.3d 969, 973-74 (7th Cir. 2006) (police informing suspect who had invoked Miranda rights of the evidence against the penalties he faced is not interrogation). Rather, it merely gave Rudd the opportunity to voluntarily discuss his case with a fellow inmate. To the extent it could be argued otherwise, police removed any arguable compulsion by advising Rudd any subsequent conversation with his co-defendant could be used against him. See Mauro, 481 U.S. at 527 n.5 (police warning eliminated any suggestion police created psychological ploy). Moreover, Rudd's incriminating statements were made after his earlier waiver of Miranda rights and his voluntary submission to direct police interrogation. See Suppression Hearing at 114.[26]

[26] The state courts did not rely on the initial Miranda waiver in their application of Innis and did not make a finding whether Rudd had formally "waived" his rights. Nevertheless, the uncontested testimony of the detective, which was credited by the trial court, establishes Rudd's initial waiver. On habeas review, evidence of the initial waiver is relevant to two issues: (1) Rudd's understand-

Thus, Rudd's case is unlike the Third Circuit's recent decision in Green. First, Green was decided on direct appeal and the court was not required to apply the deferential review of § 2254. Second, in Green, 2008 WL 4014129, at *6, *8, police affirmatively plotted to evade the procedural safeguards of Miranda by positing the suspect's guilt, and obtaining an incriminating response before the suspect was informed of his Fifth Amendment right to remain silent and obtain counsel. By twice advising Rudd of his Miranda rights – and obtaining a waiver after the first warning – police removed the elements of compulsion and coercion that are intrinsic to a Fifth Amendment violation under Innis. Moreover, unlike the defendant's statements in Green, Rudd's statements were not made in the coercive presence of police; rather, Rudd believed he was alone in a room with his co-defendant.

Similarly, Rudd's case differs from United States v. Lafferty, 503 f.3d 293 (3d Cir. 2007), which he claims provides direct support for his petition. In Lafferty, 503 F.3d 293 (3d Cir.2007), which he claims provides direct support for his petition. In Lafferty, the court held on direct appeal that police violated the Fifth Amendment by con

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ing of his Fifth Amendment rights when he was advised of them the second time; and (2) the absence of police coercion or compulsion during the tape recorded conversation with the co-defendant.

ducting a joint interrogation of the defendant, who had invoked her rights, and accomplice. Id. at 302. Because the defendant had expressly invoked her Fifth Amendment rights, the court found police did not scrupulously honor those rights when they engaged in a joint interrogation. Id. By doing so, the court found police placed the defendant between "a constitutional rock and Fifth Amendment hard place" because the defendant would have been required to either react to statements by the accomplice or remain silent and thereby assent to accomplice statements that incriminated the defendant. Id. The defendant in Lafferty had "steadfastly maintained her silence" after being placed in an interrogation room with five police officers and an accomplice who had already agreed to give a statement about the crime. Id. at 304. Such conduct, the court found, violated the Fifth Amendment, especially when the defendant refused to waive Miranda rights she had previously invoked. Id.

Unlike the defendant in Lafferty, Rudd was handcuffed alone in a room with an accomplice without police. See Suppression Hearing 108,115. Moreover, Rudd never invoked his Miranda rights before he was placed in the room with his accomplice, and had previously waived his rights and agreed to speak directly with police. See Suppression Hearing at 111-14. Rudd did not face the con-

stitution dilemma confronted by the suspect in Lafferty.

In addition, Rudd's case is factually distinguishable from the other cases he cites, most of which address the potential perils of police tactics that arguably rose to the functional equivalent of interrogation. In those cases, police practices were subject to the judicial scrutiny because they arose after the suspect had invoked his Miranda rights to either remain silent or consult an attorney before answering police questions. The Court explicitly recognized this fact in Innis, 446 U.S. at 294, and Mauro, 481 U.S. at 522.[27] Subsequent appellate cases fall in the same category.

For example, in Nelson v. Fulcomer, 911 F.2d 928, 934, 938 (3d Cir. 1990), after a suspect had invoked his right to remain silent, the court found police improperly may have used a co-defendant's confession to elicit inculpatory remarks.[28] In

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[27] As discussed above, other cases, such as Green and Perkins, address when police tactics following a failure to give Miranda warnings constitute a constitutional violation.

[28] Rudd's reliance on Nelson also is misplaced for other reasons. The Court remanded the case for an evidentiary hearing on whether a co defendant's confession had been communicated to the suspect by the co-defendant or by the police before the suspect made his inculpatory remarks. Nelson, 911 F.2d at 938. Thus, there is no holding that controls the police failure to scrupulously

Lafferty, 503 F.3d at 304, the suspect invoked her right to remain silent but was subject to direct police interrogation thereafter. In Combs v. Wingo, 465 F.2d 96, 99 (6th Cir. 1972), the suspect invoked his right to remain silent and then the officer showed him a ballistics report, which the court found was intended to break him down and elicit a confession. Similarly, in People v. Ferro, 63 N.Y.2d 316, 323 (N.Y. 1984), after the suspect invoked his right to remain silent, people placed stolen fur coats in front of him to elicit a confession.

The significance of a suspect's invocation of Miranda's procedure safeguards was further recognized in the dissenting opinions in Innis –which appear to provide the underpinnings of Rudd's legal theory. Advocates of a more expansive reading of Miranda presumed the challenge police tactics would be used to overcome a suspect's invocation of Miranda rights. See eg. Innis, 446 U.S. 311, 313 (Stevens, J. dissenting) (warning of police attempts to elicit information following invocation of Miranda rights, and expressing concern the

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honor the suspect's invocation of his Fifth Amendment rights by engaging in a ploy to induce the defendant to change his mind and submit to questioning. Lafferty, 503 F.3d at 301. Nelson is further undermined because it was superseded by the Antiterroism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. See id. at 300.

Court's holding would "create an incentive for police to ignore a suspect's invocation of his rights"); see also Lafferty, 503 F.3d at 302, 303 (noting it was "not a situation where police schemed to create a situation where [the suspect] would rescind invocation of her right to remain silent;" law enforcement must scrupulously honor a suspect's right to cut off questioning).

Unlike the suspects in the cited cases, Rudd never invoked his rights before police engaged in the contested investigative ploy. Even assuming the absence of evidence supporting his initial waiver, there is no evidence Rudd invoked his rights or that police failed to honor his invocation of Fifth Amendment safeguards. Rather, police followed a judicially mandated procedure in which Rudd was advised of his Miranda rights and was explicitly warned his conversation with a co-defendant – not police – could be used against him.

Rudd's failure to explicitly acknowledge or waive his rights at that time is not dispositive. As in Mauro, Rudd was given unequivocal notice of the consequences he faced if he elected to speak to his co-defendant. Armed with the knowledge of the potential adverse consequences, Rudd elected to speak to his co-defendant. See Mauro, 481 U.S. at 527 n.5 (defendant, with knowledge police were listening, could have chosen not to speak, thereby rebutting an atmosphere of oppressive police con-

duct); cf. United States v. Velasquez, 626 F.2d 314, 320 (3d Cir. 1980) (willingness to answer questions after acknowledging and understanding of Miranda rights constitutes an implied waiver of Fifth Amendment rights).

Rudd has failed to rebut the state court's factual findings, based on testimony of detectives, that he was paying attention to the warnings and appeared to understand them. See Trial Court Op. at 15, 15 n.7. State court credibility determinations are precisely the type of findings that merit deference in federal habeas proceedings. See Thompson, 516 U.S. 111-12; Oppong, 165 Fed. Appx. At 160 & n.3 (relying on trial court's credibility determinations to support factual findings concerning a custodial interrogation). The state court's findings are further bolstered by Rudd's tape recorded statements in which he acknowledged police may be listening to his statements. Such evidence supports the state court's application of Innis to conclude police did not interrogate Rudd and he spoke freely without any hint of coercion or fear.

The voluntariness of Rudd's statements is further bolstered by his initial Miranda waiver when he spoke freely under direct police interrogation. See Trial Court Opinion at 115. Rudd's initial waiver was given only a short time before the contested conversation with his co-defendant, and was

never rescinded when he was read his Miranda rights a second time.[29] These facts establish the absence of any form of indirect police interrogation. As the Third Circuit has noted, police tactics become more questionable when police repeat Miranda warnings after a suspect has invoked his rights, see Lafferty, 503 F.3d at 304 n.10, or when police intentionally evade Miranda when constitutionally required to follow its mandate, see Green, 2008 WL 4014129, at *6, *8. Multiple attempts to elicit a Miranda waiver from a suspect who previously has invoked his rights demonstrates "subtle coercive pressure" condemned by Miranda. See id. Rudd, of course, not only failed to invoke his rights, he had affirmatively waived them. The court's concern in Lafferty and in Green, therefore, is not an issue here.

All of these factors, viewed in totality, establish Rudd had no reason to believe he was compelled to speak to his co-defendant because of

[29] Even absent express state court factual findings concerning the initial warnings, Rudd cannot contend the original Miranda warnings were stale. See United States v. Pruden, 398 F.3d 241, 246 (3d Cir. 2005). Moreover, as the Commonwealth notes, Rudd's familiarity with Miranda is further established by his waiver of Miranda three weeks earlier following his initial arrest by Philadelphia police. See Transcript of Suppression Hearing at 27, Commonwealth v. Rudd, No. 2326-08 (Ct. Com. Pl. Mont. Cot. 21, 2003).

some legal authority police possessed to force him to answer questions. See Perkins, 496 U.S. at 298 (suspect had no reason to feel undercover agent had legal authority to force him to answer questions). Given the divergent federal appellate court decisions on this issue, and the judicial acknowledgement of the fact-intensive nature of such inquiries, Rudd cannot establish the state courts unreasonably applied Innis when it held Rudd's statements were voluntary comments to a co-defendant who was not cooperating with police. See generally Fischetti v. Johnson, 384 F.3d 140, 151 (3d Cir. 2004) (lower court decisions may support reasonableness of state court application of Supreme Court law).

Nevertheless, Rudd attempts to distinguish Perkins, and similar cases relied upon by the Commonwealth, such as Meachum v. Alexander, 496 U.S. 914 (1990) and United States v. Henry, 2007 WL 419197 (E.D. Pa. Feb. 2, 2007) (DuBois, J.), by stating such suspects were imprisoned for other crimes when they inculpated themselves, whereas Rudd was questioned about the crimes for which he was incarcerated. See Petitioner's Reply at 6-7. Rudd claims the atmosphere of a prison is somehow less coercive than the atmosphere of a police holding room following an arrest. See Petitioner's Reply at 7. The rationale of Miranda, which requires Fifth Amendment warnings when

a suspect in custody believes he is conversing with police, applies with equal force regardless of the underlying nature of, or reason for, the suspect's incarceration. See Perkins, 496 U.S. at 296 (safeguards of Miranda should be enforced only when the "concerns that powered the decision are implicated") (quoting Berkemer v. McCarthy, 468 U.S. 420, 437 (1984)). It is the deprivation of liberty, i.e., the fact of detention, that constitutes the operative fact. See Perkins, 496 U.S. at 299; Miranda, 384 U.S. at 444 (inquiry is whether suspect was "taken into custody or otherwise deprived of his freedom of action in any significant way"). This is so regardless whether the deprivation is for the crime under investigation or for a previous offense. See id.

Accordingly, I make the following:

RECOMMENDATION

AND NOW, this day of September, 2008, it is respectfully recommended Rudd's claim be DENIED with prejudice as meritless. It is further recommended that there is probable cause to issue a certificate of appealability. The petitioner may file objections to this Report and Recommendation within ten days after being served with a copy thereof. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights. See Leyva v. Williams, 504 F.3d 357, 364 (3d Cir. 2007).

BY THE COURT:

/s/Timothy R. Rice
Timothy R. Rice
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Shareff Rudd,

Petitioner

Criminal No. 08-2021

vs.

Jeffrey Beard, Secretary
of the Pennsylvania Dept.
of Corrections, et al.

Respondents

Habeas Corpus

CERTIFICATE OF SERVICE

COMES NOW, Burton A. Rose, Attorney for the Defendant Shareff Rudd in the above captioned matter, and hereby respectfully certifies that a true and correct copy of the attached Statement of Objections to Report and Recommendation of United States Magistrate Judge has been forwarded by First Class ail and ECF to:

Hon Timothy R. Rice
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Respectfully submitted,

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Attorney for Shareff Rudd

Dated: October 3, 2008